

## Report: AIPPI Congress London 2019

Thanks to the support of the Belgian group of the AIPPI, I was able to attend the annual AIPPI World Congress taking place in London this year. Hereunder I provide a report of the congress, including a first section containing general remarks and a second section dedicated to two of the resolutions resorting from the study questions to which various members of the Belgian group contributed.

### **1. General remarks**

Although the congress did not have any general theme or subject, I noticed that two topics did come up at several instances and had a noticeable impact on proceedings. The first topic was, to little surprise, Brexit. Being located in the hearth of political London, close to both the Houses of Parliament and the UK Supreme Court, one did not have to look far to notice that Brexit was still at the front and centre of the news in the UK. This was emphasised even more given that during the congress, the UK Supreme Court held a two-day hearing regarding the potentially unconstitutional dissolving of Parliament as done by Prime Minister Boris Johnson, leading to much press attention and protests only fifty meters away from the conference centre.

During the congress, the focus of the AIPPI's members was obviously more on the impact of Brexit on IP. Pundits agreed that the impact would be most profound on trademarks and design rights, due to the existence of unitary rights in the EU. However, at several times efforts were made to reassure the IP community that all necessary preparations have been made. This was done during the opening ceremony keynote by the former UK Minister responsible for IP, Jo Johnson (*n.b.* Boris' brother), and also during a dedicated panel session on IP and Brexit. All held that legal certainty and continuity shall be provided and the UK will remain a prime hub for the protection and exercise of IP rights. This view was also shared by the present in-house and external counsels during the panel. They all seemed to agree that preparation is required, but nevertheless felt confident that Brexit would not weaken the protection of (their) IP rights in the UK or the EU.

Obviously, some questions do still remain. For example: the impact of Brexit on the Unified Patent and UPC, whether UK trade mark attorneys and practitioners will still be able to represent their clients before the EUIPO and other administrations, *etc.* These questions and more will still require further discussions with the EU and also depend on whether a *hard* or *soft* Brexit will eventually be achieved.

Aside from Brexit, another topic which regularly came up during the congress, at least in my opinion, is China's changing role in the world of IP. China has traditionally been regarded mostly as a country at the origin of several IP infringements and as a source of counterfeit goods. This aspect is still true today, as demonstrated during a panel on counterfeit and border measures where statistics showed that more than 40% of counterfeit goods sold worldwide are still being produced in China, with an additional 40% originating from Hong Kong. However, China is at the same time continuously taking steps to improve its IP system, by updating its substantive law and modernising its court system. The latter can be seen both on the patent side, with an increasing reputation of China's patent courts, but also on *soft* IP, as demonstrated by the establishment of the Beijing Internet Court in 2018. The latter court, dealing with copyright and other infringements in an online context, in particular appears to be worthy of some closer attention. Its entire procedure is organised as an Internet Trial



model. This means that all procedural steps, from filing a claim, submitting arguments and evidence and even hearings, take place online. Judicial Blockchain ensures the security of submitted documents and the average duration of a trial is only 40 days, resulting in more than 30,000 cases being handled during the first year of its existence. Something a former lawyer from a country where court digitalisation has not been without its problems and where judicial backlogs can run up to several years, can only dream of...

Whether the above steps are only creating a façade of compliancy or are indeed turning China into a new cornerstone in the IP landscape will have to be seen in the years to come. In any event, I am sure that the members Chinese group of the AIPPI will do anything to convince the IP community of the latter next year at the AIPPI World Congress in Guangzhou.

## **2. Study questions and resolutions**

During the congress, I had the opportunity to participate to two of the plenary sessions on the study questions. This included the session on "*IP damages for acts other than sale*" and the one on "*Copyright in artificially generated work*".

### 2.1. IP damages for acts other than sale

Two years ago, one of the study questions and resulting resolutions from the Sidney congress covered the subject "Quantification of monetary relief", focusing on the quantification of damages in the event of IP infringements when a sale has occurred. The main principles established there were that damages could be quantified either by multiplying the infringing mass with the relevant profit margin or to refer to royalties.

The goal of the study question for the London congress was to establish the principles that can be used to quantify damages caused by infringing acts other than sale (*e.g.* importing, warehousing, manufacturing, using and offering). In addition, the very peculiar issue of franking was addressed. This principle stemming from (in the words of the reporter-general) "*ancient common law caselaw*", means that there should be no further liability for infringing goods as soon as damages have been paid to the right holder, causing the infringing goods to freely circulate in the market. It would be a sort of 'forced exhaustion', not requiring the consent but merely the compensation of the right holder.

Based on the group reports, there was a clear consensus on several points regarding the award of damages in the event of infringing acts other than sale:

- Irrespective of whether an injunction can be obtained, damages should also in principle be available as a remedy for the right holder.
- A causal nexus is required between the infringement and loss;
- Potential sales are relevant in order to quantify non-sales loss;
- Double recovery of loss should be avoided;
- No policy of franking should be adopted.

A strong majority also considered that as a minimum, the right holder would be entitled to a reasonable royalty (which, depending on the circumstances, can be very low or even amount to a symbolic euro). If further loss can be proven, it should also be compensated.



Even though the national groups mostly agreed on the above points, the remainder and the exact wording of the resolution was the subject of intensive debates, including active participation by the Belgian group. The most heavily debated aspect was paragraph 6) of the resolution, concerning the criteria the court should take into account when assessing damages for non-sales infringements. These criteria complete the list provided in the Sidney resolution, by adding relevant factors for non-sales infringements.

In relation to products obtained from a patented process, one of the criteria of the second draft resolution debated during the plenary session was the following: *“potential sales to be made by the infringer of any products manufactured using the process”*. The concern of several groups, most notably the UK and Japanese groups, was that this could lead to over-quantification of damages.

The leadership of the study committee provided the following example to clarify this: imagine a patented process X is used to produce sugar and that sugar is afterwards used to produce a cake. In this example, the potential sales of the cake should not be a relevant criterion for the quantification of damages of the right holder of the patented process X, as the price of the cake will be substantially higher than the value of using the patented process X. Therefore, the UK and Japanese groups proposed to add the following precision to the second bullet point of paragraph 6), b): *“as long as, in respect of the potential sales, the right holder proves a causal nexus between the infringement and the right holder’s loss”*.

Although the Belgian group agreed with the underlying intention of the proposed amendment, we argued that it could have negative consequences. By adding an explicit reference to the causal nexus in only one of the criteria, it could be read *a contrario* that the other criteria do not require any causal nexus to be established. This was clear shortly thereafter, when a similar amendment had to be proposed to paragraph 6), a) first bullet point in order to ensure consistency. Nevertheless, the amendment had sufficient support and was adopted.

## 2.2. Copyright in artificially generated works

Finally, I attended the plenary session on copyright debating the draft resolution regarding artificially generated works. Contrary the topic of damages described above, I did not participate to the preparation of the Belgian Group’s report on this topic, nor did I attend the study committee meeting. However, I was able to learn from the other members of the Belgian Group, that this topic gave rise to quite some discussions.

The topic of artificially generated works has gained in popularity the last few years, mainly due to the reason that artificial intelligence (AI) is becoming ever more advanced and capable of assisting or even replacing humans in several tasks. Significant investments are being made in the sector to continue this advancement, allowing AI to create elements that could potentially be considered as ‘works’ under relevant copyright provisions. Given that one of the main goals of copyright is to encourage the creation of works, the question is whether and under what conditions copyright, related rights and/or *sui generis* rights should be granted to such AI generated ‘works’.



Based on the national reports, the general consensus (+85%) was that copyright protection can only be granted if there is sufficient human intervention in the creation of the ‘works’, although it remains unclear at what stage and to what extent the human intervention should occur. A similar majority agreed that the originality criterium should remain a condition in order to obtain exclusive rights under copyright and that the protection regime (scope of rights, term, *etc.*) should be identical to that of other works.

Furthermore, a limited majority (+55%) argued that related rights should be granted to AI generated works, but only a minority (+40%) was in favour of creating a new *sui generis* right for ‘works’ created without any human intervention (the goal of this right would be to reward *investments* rather than *creativity*).

During the plenary session the discussion points were limited. The UK group did propose to either change the wording or remove in their entirety the examples provided in paragraph 2) of the resolution, as they interpret current law and would make it more difficult to propose further resolutions on this topic in the future. This led to a rather unique situation in which both the proposal to change the wording of the examples, as well as the proposal to remove them resulted in a tie vote (!). Given that a tie vote means that a proposal is not accepted (and after a short technical break during which the UK group tried their best to lobby other groups, including members of the Belgian group), the original wording was maintained.

A final discussion point was regarding the last sentence of paragraph 5), about whether AI generated works not covered by existing protection regimes (under related rights or other) should be eligible for protection under copyright, related rights or other. The draft resolution debated during the plenary session stated that such AI generated works “*should not be eligible*” for exclusive rights under copyright or related rights. The UK group wanted to delete this sentence and leave this matter to national law. The Belgian, German and Dutch group shared the sentiment of the UK group, but instead proposed to amend the sentence in order to ‘soften’ the wording and avoid taking a clear position at this stage rather than removing it completely. That way, a position can still be taken in the future, but the current input from the national groups can be included in the resolution. In the end, the latter proposal was accepted (also by the UK group) which led to the final text of the resolution as it stands now.

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